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SUBJECT: DEMARCHE REQUEST ON THE GOLDSTONE REPORT

REF: State 098567, USUN 0958

¶1. (U) This is an Action Request. Please see paragraph three.

¶2. (SBU) Summary. On September 15, South African Justice Richard Goldstone released the report of his fact-finding Mission into alleged violations of human rights and international humanitarian law in the fighting between Hamas and Israel in the Gaza Strip from December 2008-January 2009 and other matters. While we acknowledge the serious allegations raised in relation to the Gaza conflict, the USG has serious concerns about the report, including its unbalanced focus on Israeli actions, its overly sweeping legal conclusions, and many of its recommendations. In response to a request from the Palestinian observer and the Arab Group, the General Assembly has scheduled a discussion of the report starting on Wednesday, November 4 (possibly continuing on the 5th). The Arab Group, the OIC and others will present a resolution for adoption by the Assembly at that time which is likely to include elements unacceptable to the United States. If adopted, these elements could severely undermine the Arab-Israeli peace effort, and damage U.S. efforts to re-engage in multilateral fora and to develop impartial mechanisms for the consideration of human rights. End Summary.

¶3. (SBU) Action Request: Drawing on the background in paras 4-8, the goals outlined in paras 9, and talking points in paras 10-13, Missions should demarche host governments on the U.S. position on the upcoming General Assembly debate on November 4 on the Report of the UN Fact-Finding Mission on the Gaza Conflict (the Goldstone Report). Missions should approach host governments at a level sufficient to generate support for the U.S. position, using the materials provided in a manner designed to convince them to vote against any resolution that would include counterproductive elements, as described below.

Background

¶4. (SBU) In January 2009, the UN Human Rights Council (HRC) in Geneva held a Special Session on the December-January conflict in the Gaza Strip between Israel and Hamas. It mandated a fact-finding mission to investigate "all violations of international human rights law and international humanitarian law" by Israel. In April, the HRC President appointed South African Justice Richard Goldstone to lead the mission. He said he would investigate all parties to the conflict: Israel, Hamas and Fatah, although the HRC did not formally change his one-sided mandate. Separately, the United States has engaged with Israel since January, 2009 to understand the investigations they have underway and to stress the importance of complete and credible inquiry into alleged allegations of violations of human rights and international humanitarian law. Due to the prominence of the conflict, capitals have been engaged on this at a high level to include frequent statements and interventions by Foreign Ministers and above (a factor posts should take into account in making the demarche).

15. (SBU) On September 15, after conducting hearings in Gaza and Geneva, Goldstone conveyed his final report to the HRC. The USG has serious concerns about the report, including its unbalanced focus on Israeli actions; its overly sweeping legal conclusions; and many of its recommendations, some of which must be resolved politically between the Israelis and the Palestinians. Nonetheless, we attempted to negotiate with the Palestinian delegation to the HRC to reshape an initial, one-sided draft into a balanced, minimalist HRC resolution on the report. However, the Arab Group, the NAM, the African Group and the OIC (at the urging of the Palestinians) changed course on October 2 and asked that the resolution be deferred until the next regularly-scheduled HRC session in March, 2010.

16. (SBU) The Arab Group, the NAM, the African Group and the OIC (again at the urging of the Palestinians) changed course again on October 9, by calling for an HRC Special Session to take up the report. While we did not support holding this session, we did not actively oppose it; it took place on October 15-16. At the Special Session, the HRC passed a resolution endorsing the full report and its recommendations, and referring the report to the General Assembly, but explicitly citing only alleged violations by Israel. Neither Hamas nor its tactic of intentionally launching rocket and mortar attacks into civilian areas that places civilians at severe risk were mentioned in the resolution. The resolution passed by a vote of 25 to 6, with 11 abstentions and five (evidently intentional) absences, by far the smallest margin of support for a resolution dealing with Israel in the three years the HRC has existed. Hungary, Italy, Netherlands, Slovakia, and Ukraine joined the United States in voting against the resolution. Belgium, Bosnia and Herzegovina, Burkina Faso, Cameroon, Gabon, Japan, Mexico, Norway, the Republic of Korea, Slovenia and Uruguay abstained. The UK, France, Angola, Kyrgyzstan and Madagascar chose not to register any vote. Argentina, Bahrain, Bangladesh, Bolivia, Brazil, Chile, China, Cuba, Djibouti, Egypt, Ghana, India, Indonesia, Jordan, Mauritius, Nicaragua, Nigeria, Pakistan, Philippines, Qatar, Russian Federation, Saudi Arabia, Senegal, South Africa, and Zambia voted for the resolution. However, in explaining their votes in favor, Russia and China clearly indicated they did not support all of the report's recommendations, particularly the proposals that it be referred to the UN Security Council or the International Criminal Court. Many other delegations expressed reservations in Geneva through somewhat helpful statements that blunted their yes votes - including India and Argentina.

17. (SBU) Simultaneous to developments in Geneva, in New York we agreed to move forward a regularly-scheduled monthly UN Security Council Open Debate on the Middle East from October 20 to October 14, to give the Arab Group and other members a chance to express their views about the Goldstone report, though there was virtually no support in the Council for adding the Goldstone report to the regular UNSC agenda. The session, held as a regularly scheduled open debate, gave many NAM and OIC members the opportunity to express their views on the report. Subsequently, in response to a request from the Palestinian observer which was endorsed by the Arab Group, on October 28, UN General Assembly President Ali Treki (Libya) scheduled a discussion of the report in the Assembly starting on Wednesday, November 4 (and possible continuing on the 5th). We believe a General Assembly discussion was predictable, as the HRC Special Session referred the report to the UNGA. In light of the positions taken by Russia, China and some NAM members at the HRC, there is a possibility for somewhat greater support for the U.S. position in the Assembly than has been the case in the past with regard to issues dealing with Israel. In addition, while the Goldstone Report does not ignore Israeli investigations, it summarily dismisses the willingness of the Israeli government to carry out impartial investigations. Since September 15, more information has emerged on the nature and breadth of those investigations and new ones have been initiated.

18. (SBU) The Arab Group, the OIC and others will present a resolution for adoption by the Assembly on November 4 or 5. They have not yet finalized their text, so we have not yet

seen a draft resolution, but according to several delegations many elements now under discussion appear unacceptable because they are entirely political in nature. This carries a great risk of setting dangerous precedents and severely undermining our efforts to re-launch Israeli-Palestinian negotiations on final status issues. These include:

-- Attempting to direct or pressure the Security Council to take up the matter. As noted above, many Council members are already on record opposing adding the report to its agenda. The Council is already seized of the situation in Gaza as part of its monthly deliberations on the Middle East.

-- Establishing an UNGA committee or other body to monitor domestic investigations. The capability of such a body to pronounce impartially on the adequacy of ongoing criminal investigations without the full cooperation of the parties is highly questionable, as the rights of both the accusers and those under investigation must be maintained, and much of the relevant information to make an outside assessment may be restricted by military necessity. The Gaza situation has not been resolved, and there has been a noticeable increase in rocket and mortar attacks from Gaza into Israel in recent months. It is unrealistic to think that Hamas will make those who launch the rockets available to a UN committee, that Gazan civilians would risk their lives to share with such a body information about Hamas' violations of international humanitarian law, or that Israel would reveal the methods and sources it uses to establish who is launching rockets at it from specific locations, while the conflict is still ongoing.

-- Setting time-limits for Israeli or Palestinian domestic investigations. Time limits on a legal process would be artificial and might incentivize investigators to do a rush job, or serve to delegitimize genuinely independent domestic investigations that need time to hear evidence from all sides. We should not put the parties under a gun to produce results.

-- Calling for the exercise of jurisdiction by other national courts over GoI actions alleged in the report. Israel has the democratic institutions to conduct credible investigations. With such an UNGA endorsement in hand, some states might try to initiate political show trials against Israeli leaders designed intentionally to scuttle efforts to re-initiate peace negotiations between Israel and the Palestinians. This could be cited as a dubious precedent in the future that could be used against officials from other countries. As a separate matter, attempts to issue warrants for Israeli leaders in Europe or elsewhere would also complicate the environment for Middle East peace efforts.

-- Attempting to establish an International Tribunal. The GA does not have the authority to impose such a tribunal and indeed has never attempted to do so before. Without the consent of the parties such a body would be unable to function, and it too might be cited in the future as a precedent that could be used against other countries.

-- Encouraging the Security Council to refer allegations in the report to the International Criminal Court. The GA does not have the authority to refer matters to the ICC itself. In addition, neither Israel nor the Palestinian Authority (which is not a state) are parties to the ICC. The Rome Statute which established the ICC is clear on the need to respect the principle of complementarity, which provides for international-level legal action only after legal efforts at the national level are exhausted. Israel's investigations are ongoing.

-- Referring the matter to the International Court of Justice. No purpose would be served by referring a question to the ICJ for an Advisory Opinion while active investigations are underway that could resolve those questions or render them irrelevant.

-- Encouraging the convocation of the parties to the Fourth Geneva Convention. The purpose would be to discuss the future legality of munitions like white phosphorous (WP), which was

used by the Israelis during the Gaza conflict. This goes far beyond questions related to the fighting in Gaza, and the United States would not support such a step. WP is a lawful conventional munition possessed by many armies worldwide.

-- Calling for sanctions against Israel. This would clearly be a politicized step at a time when Israel is actively investigating its own actions and the Palestinians are not.

-- Welcoming or endorsing the report or its recommendations in full. Many of the elements described above are included in the report. A blanket endorsement would open the door to many negative initiatives.

9. (SBU) USG Goals. Our broad objectives are:

- to prevent the passage of a General Assembly resolution that includes elements detrimental to U.S. interests, or at least to maximize the number of no votes and abstentions.
- to promote accountability for violations of international law.
- to keep any future action on the Goldstone report out of the Security Council, ICC, ICJ or other international venue.
- to avoid US isolation, and minimize damage to the process of U.S. reengagement in multilateral fora and our efforts to break down regional bloc divisions.
- to minimize potential damage to ongoing efforts to re-launch permanent status negotiations between two viable parties that would lead to the creation of an independent Palestinian state.
- to avoid, or at least minimize, political damage to the Palestinian Authority and President Abbas, and any public U.S.-Palestinian confrontation.

10. (U) Talking Points For All Recipients. Posts may deploy these points or select material contained therein in the best manner to meet USG objectives.

-- The President of the UN General Assembly has scheduled for Wednesday, November 4, a debate on the Goldstone Report on the fighting between Israel and Hamas last winter in Gaza. The Arab Group and others will present a resolution for the Assembly's consideration.

-- The rush to GA consideration will provide virtually no time for most UN members to study and deliberate on this important issue, which could set precedents for other conflicts, potentially involving any UN member, including your own country.

-- As members of the UN Human Rights Council, we have had time to study the Goldstone report in detail and have serious concerns about many of its aspects. It contains not only numerous allegations about violations of human rights and international humanitarian law that the report's authors admit have not been fully corroborated, but also a sweeping set of recommendations for UN and other international bodies whose adoption would be without precedent in prior legal or diplomatic practice.

-- Having noted the above, we understand and share the deep concern of the international community regarding the fighting last winter in Gaza. The United States is moving vigorously to pursue comprehensive peace in the Middle East, including the two-state solution.

-- The United States also strongly supports accountability -- including criminal investigations and punishments when cases are proven -- for violations of international human rights and humanitarian law. We have engaged with Israel to understand the investigations they have underway and to stress the importance of complete and credible inquiry into alleged allegations of violations of human rights and international humanitarian law. International law provides for complementarity -- the opportunity for states to objectively examine their own actions, and to prosecute violations when the evidence warrants.

-- The Goldstone recommendations do not give sufficient weight to the fact that Israel is currently investigating or has already investigated most of the cases noted in the report, and conducted five overarching investigations into different aspects of its military operations. The Government of Israel advises us that it currently has twenty separate investigative teams looking into allegations, with provision for Palestinians in Gaza to make complaints about Israeli actions and give evidence, and for criminal prosecution if the evidence warrants. The Israeli government was not previously aware of twelve specific incidents covered in the Goldstone report, and has stated that it forwarded these cases for investigation upon learning of them.

-- Israel has the capacity and democratic institutions to conduct investigations of this sort, and the United States will continue to urge it to do so in an in-depth manner, ensuring the investigators' full ability to pursue cases wherever they lead.

-- We were not alone in having concerns about this matter when a resolution endorsing the recommendations in the report -- that cited Israeli actions but did not mention Hamas at all -- was rushed before the Human Rights Council in a Special Session on October 16. Others voted with us or abstained, or cited their concerns about the reports' recommendations.

-- We are thus deeply concerned about possible elements the General Assembly might adopt in a resolution, such as referring the matter to other institutions, or even attempting to create new ones. Several delegations have shared with us their concern that such elements are being discussed by Arab Group members and others in New York. These would seriously undermine efforts towards peace and do nothing to encourage actual accountability.

-- We urge your country to oppose any resolution that contains any or all of the following elements:

Attempting to direct or pressure the Security Council to take up the matter. As noted above, many Council members are already on record opposing adding the report to its agenda. The Council is already seized of the situation in Gaza as part of its monthly deliberations on the Middle East.

Establishing an UNGA committee or other body to monitor domestic investigations. Even with the best of intentions, the capability of such a body to pronounce impartially on the adequacy of ongoing criminal investigations without the full cooperation of the parties is highly questionable, as the rights of both the accusers and those under investigation must be maintained, and much of the relevant information to make an outside assessment may be restricted by military necessity. The Gaza situation has not been resolved, and there has been a noticeable increase in rocket and mortar attacks from Gaza into Israel in recent months. It is unrealistic to think that Hamas will make those who launch the rockets available to a UN committee, that Gazan civilians would risk their lives to share with such a body information about Hamas' violations of international humanitarian law, or that Israel would reveal the methods and sources it uses to establish who is launching rockets at it and from where, while the conflict is still ongoing.

Setting time-limits for Israeli or Palestinian domestic investigations. Time limits on a legal process would be artificial and might incentivize investigators to do a rush job, or serve to delegitimize genuinely independent domestic investigations that in the current environment need time to hear evidence from all sides. We should not put the parties under a gun to produce results.

Calling for the exercise of jurisdiction by other national courts over GoI actions alleged in the report. Israel has the democratic institutions to conduct credible investigations. With such an UNGA endorsement in hand, some states might try to initiate political showtrials against Israeli leaders

designed intentionally to scuttle efforts to re-initiate peace negotiations between Israel and the Palestinians. This could be cited as a dubious precedent in the future, that could be used against officials from other countries. As a separate matter, attempts to issue warrants for Israeli leaders in Europe or elsewhere would also complicate Middle East peace efforts.

Attempting to establish an International Tribunal. The GA does not have the authority to impose such a tribunal and indeed has never attempted to do so before. Without the consent of the parties such a body would be unable to function, and it too might be cited in the future as a precedent that could be used against other countries.

Encouraging the Security Council to refer allegations in the report to the International Criminal Court. The GA does not have the authority to refer matters to the ICC itself. In addition, neither Israel nor the Palestinian Authority (which is not a state) are parties to the ICC. The Rome Statute, which established the ICC, is clear on the need to respect the principle of complementarity, which provides for international-level legal action only after legal efforts at the national level are exhausted. Israel's investigations are ongoing.

Referring the matter to the International Court of Justice. No purpose would be served by referring a question to the ICJ for an Advisory Opinion while active investigations are underway that could resolve those questions or render them moot.

Encouraging the convocation of the parties to the Fourth Geneva Convention. The purpose would be to discuss the future legality of munitions like white phosphorous (WP), which was used by the Israelis during the Gaza conflict. This goes far beyond questions related to the fighting in Gaza, and the United States would not support such a step. WP is a lawful conventional munition possessed by many armies worldwide.

Calling for sanctions against Israel. This would clearly be a politicized step at a time when Israel is actively investigating its own actions and the Palestinians are not.

Welcoming or endorsing the report or its recommendations in full. Many of the elements described above are included in the report. A blanket endorsement would open the door to many negative initiatives.

-- We urge your country to join us in opposing these elements. Your doing so would help to avoid setting precedents that can affect us all, and help promote peace in the Middle East. We urge you to convey an instruction to your mission in New York to take this approach and to work closely with the U.S. and other missions.

11. If Asked:

-- Among our principal concerns with possible General Assembly action on the Goldstone report is the potential for damage to ongoing efforts to re-launch permanent status negotiations that would lead to the creation of an independent Palestinian state.

-- Bringing about a comprehensive peace -- not only between Israel and the Palestinians, but also between Israel and Syria and Israel and Lebanon, with the full normalization of relations between Israel and its neighbors -- is chief among our goals in the Middle East. The resolution of the Israeli-Palestinian conflict through the two-state solution is central to our goal of comprehensive peace.

-- Special Envoy for Middle East Peace George Mitchell has been working closely with Israeli and Palestinian leaders, regional leaders and allies, our partners in the Quartet and others. Progress is steadily and quietly being made, and the President and his team will continue to approach this effort with perseverance and determination.

-- Both in public and private, President Obama has made clear that the negotiations should cover all permanent status issues -- borders, security, Jerusalem and refugees. We seek to create a dialogue that facilitates the compromises necessary to ensure the long-term interests of both sides.

¶12. Only for Hungary, Italy, Netherlands, Slovakia, Ukraine, Belgium, Bosnia and Herzegovina, Burkina Faso, Cameroon, Gabon, Japan, Mexico, Norway, the Republic of Korea, Slovenia, Uruguay, the UK, France, Angola, Madagascar, Kyrgyzstan, Russia and China:

-- Your opposition to counterproductive elements is important to us and to our shared efforts to promote peace in the Middle East. We appreciate your opposition to problematic ideas in Geneva, and hope this will continue in New York.

¶13. Only for Security Council members:

-- We do not see the Goldstone Report as an appropriate matter for consideration of the Security Council.

-- We should make it plain to those trying to force a Security Council action, that the Council chooses the matters it will take up based on its mandate in the UN Charter to maintain international peace and security.

¶14. Posts should reply by front channel cable to the Department, infoing USUN New York, no later than, 12:00 noon EST, Wednesday, November 4, noting host-government reaction to the demarche. Please slug cables for IO/HR, Paul Kruchowski; IO/UNP, Andrew Morrison and NEA/IPA, Jeffrey Giauque; and USUN New York, Ellen Germain.
CLINTON